EOD 3-13-00

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

CHARLES THURMOND, and	§	
HAL LAPRAY,	§	
Plaintiffs,	§	
On Behalf of Themselves and All	§	
Others Similarly Situated.	§	
	§	**1:99CV0711 (TH)**
v.	§	**JURY**
	§	
COMPAQ COMPUTER	§	
CORPORATION	§	
Defendant.	§	
	§	

ORDER DENYING DEFENDANT'S MOTION FOR ABSTENTION

Before this Court is Defendant *Compaq Computer Corporation's Motion for Abstention* [40]. Having considered the motion, the response, and the arguments of counsel, this Court DENIES Defendant *Compaq Computer Corporation's Motion for Abstention* [40].

1. Facts and Procedural History

On November 30, 1999 Plaintiffs Charles Thurmond and Hal Lapray ("Plaintiffs") sued Defendant Compaq Computer Corporation ("Compaq") alleging Compaq "designed, manufactured, created, distributed, sold, marketed, or transmitted . . . FDC microcode that can

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cause the unreported corruption or loss of data." *Plaintiffs' First Amended Original Class Complaint* [8] at p.3. "Plaintiffs purchased computers, or similar devices, sold or manufactured by Defendant, or that contain floppy diskette drives ('FDDs'), floppy diskette controllers ('FDCs'), or FDC instructions or commands in the form of microcode that were designed, sold, manufactured, transmitted or created by Defendant." *Id.* at p.1. Plaintiffs seek injunctive relief and statutory damages under Title 18 U.S.C. § 1030 (the "Computer Fraud and Abuse Act"), revocation of acceptance under the Uniform Commercial Code ("UCC"), breach of contract and express and implied warranties, and declaratory relief under Title 18 U.S.C. § 1030. *Id.* at pp.10-15.

On February 18, 2000 Compaq filed *Compaq Computer Corporation's Motion for Abstention* [40] asking this Court to "stay this proceeding in favor of a concurrent state proceeding pending in the 58th District Court, Jefferson County, Texas." *Id.* at p.1. Why? Compaq argues a stay of this lawsuit "will conserve federal court resources and will serve to avoid duplicative and piecemeal litigation"; will permit the state court to interpret the notice issue relating to the Plaintiffs' warranty claims; and will not prejudice the Plaintiffs "because they have chosen to file the almost identical state court suit." *Id.* These arguments are without merit under the controlling law of abstention. So, no stay.

2. Law of Abstention

> "Abstention from the exercise of federal jurisdiction ***is the exception, not the rule.*** 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'"

That's a 1983 United States Supreme Court excerpt quoting with approval language previously

used in 1976 and 1959 United States Supreme Court decisions. Moses H. Cone Memorial Hosp. v. Mercury Const., 460 U.S. at 14 (emphasis added) (quoting Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976) and County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)). In Colorado River the United States Supreme Court recognized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." 424 U.S. at 817 (citing England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964); McClellan v. Carland, 217 U.S. 268, 281 (1910); and Cohens v. Virginia, 6 Wheat 264, 404, 5 L.Ed. 257 (1821) (dictum)). "Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . " Id. (citing McClelan v. Carland, 217 U.S. at 282 and Donovan v. City of Dallas, 377 U.S. 408 (1964)). The Fifth Circuit, of course, follows these guidelines laid out by the United States Supreme Court: "[I]n ***'extraordinary and narrow'*** circumstances, a district court may abstain from exercising jurisdiction over a case when there is a concurrent state proceeding, based on considerations of "'[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Murphy v. Uncle Bens, Inc., 168 F.3d 734, 738 (5th Cir.1999) (emphasis added) (quoting Colorado River, 424 U.S. at 817 (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952))); see Snap-On Tools Corporation v. Mason, 18 F.3d 1261 (5th Cir.1994). So how does this Court know when those "extraordinary and narrow" circumstances exist to support abstention?

In Colorado River, the United States Supreme Court outlined four factors to be considered in determining whether exceptional circumstances exist which would permit a federal court to decline to exercise its jurisdiction. In Moses H. Cone, the High Court added two more.

The six factors are:

1) assumption by either court of jurisdiction over a res;

2) the relative inconvenience of the forums;

3) the avoidance of piecemeal litigation;

4) the order in which jurisdiction was obtained by the concurrent forums;

5) whether and to what extent federal law provides the rules of decision on the merits; and

6) the adequacy of the state proceedings in protecting the rights of the party invoking federal jurisdiction.

Colorado River, supra.; Moses H. Cone, supra.; see also Murphy v. Uncle Ben's, Inc., supra.

3. Analysis

First, this case does not involve any res or property over which any court, state or federal, has taken control. However, the absence of this factor is not a "neutral item, of no weight in the scales." Murphy v. Uncle Ben's, Inc., 168 F.3d at 738; see also Evanston Insurance Company v. Jimco, Inc., 844 F.2d 1185, 1191 (5th Cir.1988). Quite the contrary, the absence of the first factor weighs *against* abstention.

Second, the federal and state suits are both pending in the same city–Beaumont, Texas. Proceeding in this Court is not inconvenient at all and, consequently, this factor weighs *against* abstention. Murphy, 168 F.3d at 768.

Third, although Compaq argues abstention would avoid "duplicative or piecemeal litigation," the United States Supreme Court has held that "the prevention of duplicative litigation is not a factor to be considered in an abstention determination." Murphy, 168 F.3d at 738 (emphasis added); Evanston, 844 F.2d at 1192 (citing Colorado River, 424 U.S. at 817). Thus, this factor weighs *against* abstention.

Fourth, although this federal lawsuit was filed first, the priority element of the Colorado River / Moses H. Cone analysis "should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." Murphy, 168 F.3d at 738; Evanston, 844 F.2d at 1190. In the state case, the Plaintiffs have merely filed their petition–to which Compaq just recently filed its answer on February 28, 2000. By stark contrast, the parties submitted extensive briefing to this Court–in part due to Compaq's roughly fourteen or so motions filed *prior to* its answer in this Court. The parties in this Court are currently working on a agreed protective order;[1] and they exchanged their initial disclosures on February 28, 2000. This factor–the considerable work already done by the parties *and this Court*–weigh *against* abstention. See Moses H. Cone, 460 U.S. at 22; Murphy, 168 F.3d at 738-40.

Fifth, in this federal case the Plaintiffs pled Title 18 U.S.C. § 1030, the "Fraud and Related Activity in Connection With Computers" statute; the Plaintiffs have not pled this federal statute in the state-court action. "The presence of a federal law issue 'must always be a major consideration weighing against surrender [of jurisdiction],' but the presence of state law issues weighs in favor of surrender only in rare circumstances." Murphy, 168 F.3d at 179 (emphasis added); Evanston, 844 F.2d at 1193 (quoting Moses H. Cone, 460 U.S. at 26). This Court has already written at length on Title 18 U.S.C. § 1030 in a similar action. See Shaw v. Toshiba, 1999 WL 1486295 (E.D.Tex.1999). Thus, this factor weighs *against* abstention.

Finally, while both federal and state courts are adequate forums for protecting the rights of the Plaintiffs, this factor can only be a neutral factor, and one that weighs *against*, and not for,

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[1]This Court eagerly awaits the parties' agreed protective order.

abstention. Murphy, 168 F.3d at 739; Evanston, 844 F.2d at 1193. Thus, the neutrality of this single factor succumbs to the heavy weight of all other five factors weighing *against* abstention. Murphy, 168 F.3d at 739; Evanston, 844 F.2d at 1193.

3. Conclusion

Absent "extraordinary and rare circumstances," a federal court–like this one–should not surrender its jurisdiction through abstention. Of the six factors this Court should consider in deciding whether to abstain from exercising its jurisdiction, Compaq has successfully shown only one factor–the adequacy of state court proceedings to protect the rights of the Plaintiffs–does *not* weigh *against* abstention. So, while all other five factors weigh *against* abstention, one factor remains neutral. When we check the scoreboard? No abstention–5, abstention–0. Suffice it to say Compaq has wholly failed to show this is one of those extraordinary and rare circumstances that would warrant this federal Court to abstain from exercising its jurisdiction.

This case is not stayed; and we shall proceed through discovery to the requested preliminary injunction and the issue of class certification.

It is SO ORDERED.

Signed this 10th day of March, 2000.

Thad Heartfield
United States District Judge